Rubberflex Sdn Bhd v Cargill (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–132 OF 1997
RAUS SHARIF J
16 JUNE 2004

Arbitration — Arbitrator — Misconduct — Finding of fact — Re-evaluation by High Court, whether appropriate — Arbitration Act 1952 s 24(2)

Arbitration — Award — Appeal — Finding of fact — Re-evaluation by High Court, whether appropriate — Arbitration Act 1952 s 24(2)

Arbitration — Procedure — Separate hearing of parties' representations by arbitrators — Whether breach of natural justice — Written submission — No examination of witnesses — Whether breach of natural justice

Both the applicant and respondent had entered into an agreement governed by the terms and conditions of the Malaysian Rubber Exchange. Dispute arose between them and one arbitrator was appointed by each of the parties ('the Joint Arbitrator'). The parties submitted in writing their arguments. The Joint Arbitrator found the applicant in default ('the Award'). The applicant appealed to the Appeal Tribunal ('the Appeal Tribunal') which dismissed the appeal. Aggrieved, the applicant applied to set aside the Appeal Tribunal's decision. The applicant complained that the procedures in hearing the parties' representations separately by the Joint Arbitrator and the Appeal Tribunal was in breach of the rule of natural justice.

Held, dismissing the application:

(1) The High Court's jurisdiction to set aside an arbitrator's award on ground of misconduct under s 24(2) of the Arbitration Act 1952 ('the Act') is very limited and only to be exercised sparingly. In grounds (iii), (iv) and (v), the applicant was in fact asking essentially this court to re-evaluate the finding of facts by the Joint Arbitrator (see para 12). It is not the function of this court to re-evaluate the finding of facts. As for the amount of damages, it was calculated by the Joint Arbitrator and the members of the Appeal Tribunal. This court is not in a position to interfere with the award, unless it can be shown that there are some irregularities, which caused miscarriage of justice appearing on the face of the award with regard to the calculation of damages. The applicant had failed to do so (see para 13); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 followed.

(2) Although the procedure adopted by the Joint Arbitrator and the Appeal Tribunal was not in line with court procedures, they must have reasons

for doing so. After all, in arbitration proceedings the arbitrator is the master and has complete and unfettered discretion on how trial should be concluded (see para 19). In the present case, both parties were given equal chance. Though they were heard separately to substantiate on their case, neither party can complain that they were condemned unheard. As such, there is no breach of rule of natural justice as alleged by the applicant. The parties were treated equally by the Joint Arbitrator and the Appeal Tribunal (see para 20).

(3) There was also no merit to the applicant's complaint that it was not given the opportunity to cross-examine the respondent's witnesses. The disputes between the parties were decided based on written submission and the documents adduced by the parties. No witnesses were called by the respondent as such the issue of cross-examining the respondent's witnesses did not arise. Moreover, in its submission before the Appeal Tribunal, this issue was never raised by the applicant. It was never an issue and to raise it now is clearly an afterthought (see para 21).

[**Bahasa Malaysia summary**

Kedua-dua pemohon dan responden telah memasuki satu perjanjian yang dikawal oleh terma-terma dan syarat-syarat Kaedah Bursa Getah Malaysia. Pertikaian timbul antara mereka dan seorang timbangtara telah dilantik oleh setiap pihak ('Timbangtara bersama'). Pihak-pihak berhujah secara bertulis. Timbangtara bersama tersebut mendapati pemohon bersalah ('Award itu'). Pemohon telah merayu ke Tribunal Rayuan ('Tribunal Rayuan tersebut') yang menolak rayuan itu. Pemohon tidak puas hati lalu memohon agar keputusan Tribunal Rayuan itu diketepikan. Pemohon mengadu bahawa prosedur mendengar representasi pihak-pihak berasingan oleh timbangtara bersama dan tribunal rayuan telah melanggar rukun keadilan semula jadi.

Diputuskan, menolak permohonan tersebut:

(1) Bidang kuasa Mahkamah Tinggi untuk mengetepikan award penimbangtara atas alasan salah laku di bawah s 24(2) Akta Timbangtara 1952 ('Akta tersebut') adalah terhad dan hanya boleh digunakan sewajarnya. Dalam alasan-alasan (iii), (iv) dan (v), pemohon sememangnya memohon mahkamah ini khususnya untuk menilai semula fakta-fakta oleh timbangtara bersama itu (lihat perenggan 12). Ia bukan fungsi mahkamah ini untuk menilai semula penemuan fakta. Berhubung jumlah ganti rugi, ia dikira oleh timbangtara bersama dan ahli-ahli tribunal rayuan. Mahkamah ini bukan dalam suatu kedudukan untuk campur tangan dengan award itu, kecuali jika ia dapat menunjukkan bahawa terdapat beberapa luar aturan, yang menyebabkan tidak terlaksananya keadilan pada dasar award itu berkaitan pengiraan ganti rugi. Pemohon telah gagal berbuat demikian

(lihat perenggan 13); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 diikut.

(2) Walaupun prosedur yang digunakan oleh timbangtara bersama dan tribunal rayuan tidak sejajar dengan prosedur mahkamah, sudah tentu terdapat sebab kenapa ia berbuat demikian. Lagipun, dalam prosiding timbangtara, penimbangtara adalah ketua dan mempunyai budi bicara penuh bagaimana perbicaraan patut dilaksanakan (lihat perenggan 19). Dalam kes semasa, kedua-dua pihak telah diberikan peluang sama. Meskipun mereka didengar secara berasingan untuk menguatkan kes mereka, kedua-dua pihak tidak dapat mengadu bahawa mereka tidak didengar. Oleh itu, tidak terdapat perlanggaran rukun keadilan semula jadi sebagaimana yang dikatakan oleh pemohon. Kedua-dua pihak dianggap sama oleh timbangtara bersama dan tribunal rayuan (lihat perenggan 20).

(3) Tiada juga merit berhubung aduan pemohon yang ia tidak diberikan peluang untuk memeriksa balas saksi-saksi responden. Pertikaian antara pihak-pihak telah diputuskan berdasarkan penghujahan bertulis yang dikemukakan oleh pihak-pihak. Tiada saksi dipanggil oleh responden, maka pemeriksaan balas saksi-saksi responden tidak timbul. Tambahan lagi, dalam penghujahannya di hadapan tribunal rayuan, persoalan ini tidak pernah ditimbulkan oleh pemohon. Ia tidak pernah menjadi satu persoalan dan untuk menimbulkannya sekarang adalah suatu yang difikirkan kemudian (lihat perenggan 21).]

Notes

For cases on misconduct of arbitrator, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1120–1124.

For cases on appeal on award, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1152–1153.

For cases on arbitration procedure generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1251–1284.

Casses referred to

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)
Ong Guan Teck & Ors & Hijjas [1982] 1 MLJ 105 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (folld)

Legislation referred to

Arbitration Act 1952 s 24(2)
Malaysian Rubber Exchange (Incorporation) Act 1962

Felix Dorairaj (Dorairaj, Low & Teh) for the applicant.
Balbir Singh (Wan Balbir & Associates) for the respondent.

Raus Sharif J:

[1] This is an application by the applicant for an order that the appeal tribunal of the Malaysian Rubber Board's ('the Appeal Tribunal') decision on award No 1/97 and/or the award No 1/97 made and published on 4 January 1997 by Tan Sri Dr Lee Boon Chim and R Sharifuddin Abidin ('the Joint Arbitrator') be set aside on the following grounds:

(1) That the Joint Arbitrator and Appeal Tribunal misconducted themselves on the proceeding by:

(a) hearing evidence/submissions of one party in the absence of the other;

(b) failing to give the applicant the opportunity to cross-examine the respondent's witness;

(c) deciding that the applicant was in default and the Appeal Tribunal dismissing the applicant's appeal;

(d) deciding that the applicant to pay RM1,242,675 as damages and compensation for the default without proof of damages;

(e) deciding on appeal that the applicant pay RM1,221,029 in damages as compensation for the default.

(2) That the award No 1/97 and the decision of the Appeal Tribunal on award No 1/97 contains error of law on the face of the record in that:

(i) the Joint Arbitrator and Appeal Tribunal decided that the applicant was the defaulting party without adequate evidence;

(ii) the Joint Arbitrator and Appeal Tribunal awarded damages as compensation without taking into account principles of law.

[2] The respondent was at all material times a supplier of latex and a member of the Malaysian Rubber Exchange and Licensing Board ('the Board') and was one of the supplier of latex to the applicant since 1995. On 14 November 1995 the applicant and respondent entered into an agreement wherein the respondent agreed to supply 7,200 WT of latex rubber for delivery or shipment from January 1996 to December 1996, that is 600 WT a month.

[3] The transaction between the applicant and respondent was governed by the terms and conditions of the Malaysian Rubber Exchange ('MRE'). MRE is a corporation established by the Malaysian Rubber Exchange (Incorporation) Act 1962 (Act 402). Under the rules and regulations of the MRE, any controversy or claims arising or relating to contract, or breach hereof, shall be settled by arbitration.

[4] Dispute arose between the applicant and respondent and one arbitrator was appointed by each of the parties. The respondent who was the claimant in the arbitration appointed YM Raja Sharifuddin Abidin and the applicant who was the respondent in the arbitration appointed Tan Sri Dr Lee Boon Chim.

[5] The respondent gave notice of appointment of its arbitrator and submission dated 6 November 1996 which set out the dispute upon which the arbitrators were called upon to decide. The applicant similarly gave notice of appointment of its arbitrator and their reply to the respondent's submission.

[6] The parties appeared before the Joint Arbitrator on 12 December 1996 at the office of the Board. On 4 January 1997, the Joint Arbitrator made their award and the applicant was informed of the award by a letter of the Board dated 6 January 1997. For ease of reference the award is reproduced.

ARBITRATION AWARD

WE, TAN SRI DR LEE BOON CHIM and R Sharifuddin Abidin having been appointed as Joint Arbitrator, pursuant to the Malaysian Rubber Exchange By Law 7 Part C, to settle the disagreement between CARGILL (M) SDN BHD ('CSMB') and RUBBERFLEX SDN BHD ('RSB') in respect of the following contracts:

LPS 479/95 dated 14 November 1995
LPS 480/95 dated 14 November 1995
LPS 481/95 dated 14 November 1995
LPS 482/95 dated 14 November 1995
LPS 483/95 dated 14 November 1995
LPS 519/95 dated 23 November 1995
LPS 484/95 dated 14 November 1995.

Wherein under submission, our findings are required on the following matters:

(1) whether there was a default and who is the defaulting party.

(2) the damages to be paid by the defaulting parties to the defaulted.

AND having considered the submission by CARGILL (M) SDN BHD and RUBBERFLEX SDN BHD have now come to the following conclusions:

(1) RUBBERFLEX SDN BHD is the defaulting party.

(Note 1: Basis for Decision)

(2) RUBBERFLEX SDN BHD has to pay RM1,242,675 damages as compensation for the default.

(Note 2: Basis for calculation of compensation).

THAT RUBBERFLEX SDN BHD has to pay interest charges at 8% per annum for contracts No LPS 479/95, 480/95, 481/95, 482/95 and 519/95 from 20 September 1996 to payment date and for contracts No 483/95 and 484/95 from 1 October and 1 November 1996 respectively to payment date.

(3) Each party to pay their own arbitration fees.

Dated this 4th day of January 1997.

Signed
(TAN SRI DR LEE BOON CHIM)
Arbitrator

Signed
(R SHARIFUDDIN ABIDIN)
Arbitrator

Signed
Signature of Chairman and
Seal of the Corporation

[7] The applicant being dissatisfied with the decision of the Joint Arbitrator lodged an appeal to the Appeal Tribunal (Appeal Tribunal). The parties submitted in writing their arguments. The Appeal Tribunal heard the appeal on 28 August 1997 and on 8 September 1997, the Appeal Tribunal made and published its decision. The appeal was dismissed and the applicant was ordered to pay RM1,221,029 as compensation.

[8] Aggrieved by the Appeal Tribunal's decision, the applicant made this application.

ISSUES AND FINDINGS

[9] The application to set aside the awards is made under s 24(2) of the Arbitration Act 1952 ('the Act') which reads as follows:

> (2) Where an arbitrator or umpire has misconducted himself of the proceeding, or an arbitrator or award has been improperly procured the High Court may set the award aside.

[10] As stated earlier, the applicant has set out five grounds of misconduct on the part of the Joint Arbitrator and the Appeal Tribunal. What constitute misconduct under the Act has been well described by Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211 who held:

> In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instant, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularities of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to effect the award that the award will be vitiated… . The plaintiff's complaint is sustainable only if the failure to do so had occasioned some irregularity causing miscarriage of justice that is approved on the face of the award.

[11] The above passage has been cited with approval by the Court of Appeal in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 and *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49. In *Future Heritage*, Richard Malanjum JCA in considering s 24(2) quoted Hashim Yeop Sani J (as he then was) in *Ong Guan Teck & Ors & Hijjas* [1982] 1 MLJ 105 at p 106:

The language of s 24(2) would seem to be rather narrow and limited. In other words, the power of the High Court to set aside an award is restricted to cases where some form of dishonesty is shown.

[12] Thus, the High Court's jurisdiction to set aside an arbitrator's award on ground of misconduct under s 24(2) of the Act is very limited and only to be exercised sparingly. Looking at the grounds advanced by the applicant, I am of the view that in grounds (iii), (iv) and (v), the applicant was in fact asking essentially this court to re-evaluate the finding of facts by the Joint Arbitrator. In the disputes, the respondent alleged that the applicant had defaulted under the contract note in that it failed and/or refused to take delivery of latex for the months of May/June/July/August/September and October 1996. The respondent suffered losses. The applicant denied liability to the losses. Nevertheless, the Joint Arbitrator found the applicant was at fault. The Appeal Tribunal reaffirmed the decision of the Joint Arbitrator.

[13] To me, it is not the function of this court to re-evaluate the said finding of facts. As for the amount of damages, it was calculated by the Joint Arbitrator and the members of the Appeal Tribunal. This court is not in a position to interfere with the award, unless it can be shown that there are some irregularities, which caused miscarriage of justice appearing on the face of the award with regard to the calculation of damages. The applicant had failed to do so. Thus, there is no merit in the applicant's ground (iii), (iv) and (v).

[14] With regard to ground (i) the thrust of the applicant's argument is that, there has been a breach of rule of natural justice on the part of the Joint Arbitrator and the Appeal Tribunal. This is because, as submitted by learned counsel for the applicant that the applicant was denied the opportunity to be present, to hear and to rebut evidence in support to the respondent's claim and in a similar vein to substantiate the applicant's defence to the respondent's claim.

[15] To understand the grievances of the applicant, it is useful to lay down the procedures adopted by the Joint Arbitrator as well as the Appeal Tribunal in deciding the disputes between the parties. It appears from the record that the hearing of the disputes between the parties was by way of written submissions. Before the Joint Arbitrator, the respondent submitted its written submission on 6 November 1996. The applicant subsequently submitted its written submissions. Then a hearing date was fixed on 12 December 1996. At the hearing, the respondent's representative was called to enter a trial room to present his case before the Joint Arbitrator while the applicant's representations wait outside. Later, the applicant's representative was requested to enter the trial room to present his case. The trial was then adjourned and on 4 January 1997, the Joint Arbitrator made their award, which was communicated by the Board to the applicant by the Board's letter dated 6 January 1997.

[16] The same procedure was followed before the Appeal Tribunal. Both parties submitted their written submissions. On 28 August 1997, the representative of the applicant and the respondent appeared separately to present their case before the Appeal Tribunal. On 8 September 1997, the Appeal Tribunal made and published its decision.

[17] Thus, the basic complaint of the applicant is that the procedures in hearing the parties' representations separately by the Joint Arbitrator and the Appeal Tribunal, was in breach of the rule of natural justice.

[18] Was there a breach of the rule of natural justice? Natural justice consist of:

(i) *audi alteram partem*, that is, the rules that no one is to be condemned unheard; and

(ii) *nemo judex in cause sua*, that is no one may be a judge in his own cause.

[19] The applicant must be relying on the first limb. But the issue is, was the applicant condemned unheard? I do not think so. No doubt the procedure adopted by the Joint Arbitrator and the Appeal Tribunal, was not in line with court procedures, but they must have reasons for doing so. After all, in arbitration proceedings the arbitrator is the master and has complete and unfettered discretion on how trial should be concluded.

[20] In the present case, both parties were given equal chance. Though they were heard separately to substantiate on their case, neither party can complain that they were condemned unheard. As such, there is no breach of rule of natural justice as alleged by the applicant. The parties were treated equally by the Joint Arbitrator and the Appeal Tribunal. While the applicant has no opportunity to know and observe the proceeding when the respondent's representative was making his clarification before the Joint Arbitrator and the Appeal Tribunal, the representative of the respondent also did not have the same opportunity when the applicant's representative was making his submission. Thus, there is no merit in the applicant's ground (i).

[21] Similarly there is also no merit to the applicant's ground (ii). Under this ground the complaint by the applicant is that it was not given the opportunity to cross-examine the respondent's witnesses. But as stated earlier, the disputes between the parties were decided based on written submission and the documents adduced by the parties. No witnesses were called by the respondent as such the issue of cross-examining the respondent's witnesses does not arise. Moreover, in its submission before the Appeal Tribunal, this issue was never raised by the applicant. It was never an issue and to raise it now is clearly an afterthought.

[22] On the above reasons, I am of the view that the Joint Arbitrator and the Appeal Tribunal have not misconducted themselves within the meaning of s 24(2) of the Act. Accordingly, the applicant's application is dismissed with costs.

Application dismissed with costs.

Reported by Loo Lai Mee